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No. 02-322

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner,

v.

CITY OF CHICAGO,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. §552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database); and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption (7)(C), 5 U.S.C. §552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption (7)(A), 5 U.S.C. §552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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Now comes the Fraternal Order of Police, on behalf of the more than 303,000 member law enforcement personnel nationwide, by and through undersigned counsel, and hereby respectfully submits its Brief In Support Of The Petition For Writ Of Certiorari filed on behalf of the United States Department of The Treasury, Bureau of Alcohol, Tobacco and Firearms, for review of the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW[1]

The opinion of the Court of Appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a-18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on April 25, 2002. A Petition for Rehearing was denied on July 25, 2002 (Pet. App. 17a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are -
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably

[1] The office of General Counsel to the National Fraternal Order of Police authored this Brief in it's entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

> be expected to constitute an unwarranted invasion of personal privacy. * * *

5 U.S.C. §552(b)(7)(A) and (C).

STATEMENT

The Fraternal Order of Police hereby adopts and incorporates by reference the Statement of the case made within the Petition for Writ of Certiorari filed on behalf of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms ("ATF").

Also submitted herewith for the Court's consideration is the amicus brief filed by the FOP in the United States Court of Appeals, Seventh Circuit. *See* Brief of Amicus Curiae The Fraternal Order of Police In Support of Rehearing En Banc, attached hereto as Appendix A.

REASONS FOR GRANTING THE PETITION

Review by this Honorable Court is warranted to reverse the decision of the United States Court of Appeals, Seventh Circuit, and its radical departure from:

(1) Supreme Court precedent;
(2) A plain reading of the Freedom of Information Act; and otherwise
(3) The accepted and usual course of judicial proceedings and review.

Sup. Ct. R. 10(a).

As set forth in the Petition for Writ of Certiorari filed by ATF, this case involves the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as it pertains to the disclosure of trace arms and multiple sales data maintained by ATF.

Squarely presented is the interpretation of §552(b) and the exemptions contained therein which preclude the mandatory disclosure if:

- Disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A); or

- Where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C).[2]

The FOP respectfully submits the decision of the United States Court of Appeals, Seventh Circuit, regarding the inapplicability of FOIA Exemption (7)(A) to various information contained within the ATF's Trace and Multiple Sales Databases, conflicts with precedent from this Court, a plain reading of the FOIA statute, and otherwise places America's law enforcement personnel directly in a line of fire that is both foreseeable and reasonable to predict. It is because the decision *sub judice* is such a remarkable departure from well-established law, and otherwise the normal course of judicial review, that this Court's exercise of its supervisory powers is warranted.

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[2] The Fraternal Order of Police ("FOP") supports and endorses the arguments presented by ATF with regard to FOIA Exemption (7)(C), as to the issue of personal privacy. For brevity sake, that argument will not be repeated herein. Nevertheless, the FOP supports the arguments and conclusion of ATF that disclosure of certain material contained in its database would constitute an unwarranted invasion of personal privacy where, as here, no counterveiling or counter-balancing interests are presented.

I. THERE ARE MORE THAN 303,000 REASONS WHY THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI FILED ON BEHALF OF ATF.

The National Fraternal Order of Police represents more than 303,000 law enforcement personnel, at every level of crime prevention and investigation, nationwide and internationally. The National Fraternal Order of Police was founded in 1915 amidst the national and local labor turmoil of those times. What was originally contemplated as an organization for the "social welfare of all the police"[3] has evolved into an active representative group working to protect and secure the laws and work of it's law enforcement members. The work of the FOP's law enforcement members has long been understood as a significant role:

> The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. To join in that high enterprise means the surrender of much individual freedom. The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved.

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[3] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing FOP Founding Member Martin Tooley, "In re: Application For Incorporation of Fraternal Order of Police," Court of Common Pleas, Allegheny County, Pennsylvania (Sept. 17, 1915), pp. 2-3.

> A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the state. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that measure which is due to the great importance of the duties he discharges.[4]

Significant interference with their work, and a threat to their very lives, is squarely presented in this case. Simply stated, the decision of the Seventh Circuit Court of Appeals, the ordered disclosure of data maintained by ATF will result in jeopardized safety to law enforcement personnel.

As discussed at length in the Brief filed by ATF, the tracing data at issue is compiled from information received by local, state and international law enforcement agencies seeking and providing information regarding ***ongoing criminal investigations.*** (Pet. App. 43a). This electronically compiled information contains information concerning ATF traces of weapons used in crimes, and includes witness names, law enforcement names and departments, other suspects and other suspected crimes. Again, the exchange of and request for tracing data is only made when an active law enforcement investigation is underway. *Gun Control Act of 1968,* 18 U.S.C. §93(g).

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[4] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p. 19.

It seems common sense that requiring ATF to release the names of witnesses and law enforcement officers that are involved in or related to ongoing law enforcement investigations, can reasonably be expected to interfere with these investigations. So too, would disclosure of law enforcement names involved in an ongoing investigation seem to obviously jeopardize the safety of those law enforcement officers.

The FOP perspective on this issue is unique and particularly appropriate to the substantive law enforcement issues raised within this case. It is America's law enforcement personnel that patrol the streets, protect people and their families, investigate crime and arrest criminals. As part of these tasks, law enforcement personnel are engaged in many different efforts, including but not limited to investigation, witness interviews, interviews with suspected associates, and review of substantive evidentiary matters. So too, law enforcement personnel may go undercover to investigate and/or infiltrate suspected crime groups. ***The decision of the Seventh Circuit will thwart each and every law enforcement effort listed above.***

It is important for this Court to exercise its supervisory powers over the United State Court of Appeals for the Seventh Circuit, in light of the clear and present danger presented to law enforcement personnel, resulting from the release of this information. It is this Court that is charged with the ultimate balancing of the interests presented. Law enforcement personnel nationwide, and on an international level, work every day to promote and ensure the safety of people everywhere. FOIA Exemption (7)(A), given a plain reading, returns that courtesy of law enforcement personnel and serves to preserve their work and their efforts while maintaining their safety and the integrity of their investiga-

tions. Most importantly, this case is not just about the release of data information, it is about the actual lives.

The FOP respectfully requests this honorable Court grant the Petition for Writ of Certiorari and review the decision of the Court of Appeals for the Seventh Circuit, with these interests in mind. The work and lives of law enforcement personnel deserve at least review of this issue.

II. THE EVIDENCE SUBMITTED BY ATF, *SUB JUDICE*, ESTABLISHED A REASONABLE BASIS TO SUSPECT "INTERFERENCE WITH ENFORCEMENT PROCEEDINGS" RESULTING FROM THE ORDERED DISCLOSURE.

A. Applicable Standard.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552 mandates disclosure of records held by an agency of the federal government. Within §552(b) are exemptions from this generally compelled disclosure. Included therein is FOIA Exemption (7)(A), which permits the withholding of agency records where disclosure "could reasonably be expected to interfere with enforcement proceedings." Applying Exemption (7)(A), a federal agency need only demonstrate "disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). In *Robbins Tire,* this Court made clear that an agency is not required to establish that the release of information would interfere with a specific enforcement proceeding. Thereafter, this Court adopted a "categorical" approach and rationale to such exemptions, noting that the agency's determination of exemption may be made "without regard to individual circumstances." *See Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 776-80 (1989).

The United States Court of Appeals, Seventh Circuit, has radically departed from that legal standard in the normal course of judicial review with the decision *sub judice.*

The first decision issued by the Seventh Circuit with regard to the requested exemptions under FOIA, 5 U.S.C. §552(b)(7)(A), was inconsistent with the FOIA statutè, the *Robbins,* supra., and the *Reporters Committee,* supra., standards. The decision held:

> ATF concedes that it is not aware of a ***single instance*** in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any ***specific instances*** in which disclosing the type of records requested ***did result*** in interference with any proceedings or investigation. ATF's hypothetic scenarios did not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk. ***ATF could not identify a ***single concrete law enforcement proceeding*** that could be endangered by the release of this information.

City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, 287 F.3d 628 (7th Cir. 2002) (emphasis added). This determination was an erroneous application of the FOIA exemption standard, and did not

reflect an appropriate consideration of the evidence presented below.

Following a Motion for Rehearing *en banc*, the Seventh Circuit Court amended its opinion, apparently to revise the applicable legal standard. Thereafter, the Court of Appeals simply stated the evidence presented was not reasonably calculated to interfere with ongoing law enforcement procedures. *City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 297 F.3d 672 (7th Cir. 2002).

B. Law Enforcement Perspective.

Who better than law enforcement personnel to attest to the interference with investigations reasonably expected to flow from the release of arms trace information?[5] Who better than the law enforcement personnel who patrol our streets, question our witnesses, look for stolen property and missing persons, and ultimately arrest criminals, to offer reasonably contemplated expectations of how any one of those acts would be hindered or interfered with as a result of the ordered disclosures? Logically, law enforcement is the most competent source of such information.

Law enforcement is keenly aware of the potentially disastrous effects of the release of the information at issue. That is why, *sub judice*, ATF submitted the declaration of Assis-

[5] This question presumes that common sense does not already sufficiently establish that the sharing of investigation information *with the suspected criminals* will hinder an ongoing criminal investigation, interfere with the work and efforts of law enforcement, if not result in lost, stolen, tainted or disturbed evidence, not to mention the risks to the lives of law enforcement.

tant Director of Field Operations for ATF, David L. Benton. Within that declaration, Mr. Benton illustrated how information related to ongoing criminal investigations is used by the ATF, and potentially criminals. As stated in the declaration, a requesting law enforcement agency provides ATF with manufacturer, weapon type, caliber and serial number information recovered in connection with a crime, and investigation of the same. ATF then conducts a trace regarding the firearm information. That trace data is then used by thousands of law enforcement agencies, both state and local, to link suspects to firearm-related criminal investigations, identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. Because of the voluminous trace requests that are received by ATF, it is practically impossible to monitor the status of each pending criminal investigation. Such monitoring can be overly burdensome on ATF and FOP member agencies. Therefore, to require ATF to provide specific "concrete examples" of *exactly how* an ongoing investigation may be jeopardized is illogical and virtually impossible, not to mention unnecessary under FOIA Exemption (7)(A) and Supreme Court precedent.

The express language of FOIA Exemption (7)(A) allows its application based on this reasonable expectation of interference. That showing was met by submission of the declaration of David L. Benton. Moreover, under well-established Supreme Court precedent, this "reasonable expectation" can be illustrated without necessarily requiring "specific instances" or "concrete examples" of the potential interference. That showing was likewise met by ATF, *sub judice,* with the declaration of David L. Benton.

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law

enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;

- Instantly, he or she has the following information:
  - Suspected crime(s);
  - Suspected crime location;
  - Suspected crime weapon(s);
  - Suspects and their associates;
  - Law enforcement officer names and departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witnesses.

- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fop member agencies consistently work on undercover investigations where firearms are traced. The

disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

Additionally, the tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

Providing trace data to any person who requests this information would jeopardize the effectiveness of law enforcement officers as related to their ongoing criminal investigations. It would potentially jeopardize the safety of those personnel working undercover, or in any other capac-

ity, with regard to that investigation. The decision by the United States Court of Appeals for the Seventh Circuit, even as amended, which held the evidence offered insufficient to establish a reasonable expectation of interference with ongoing criminal investigations, represents a significant departure from well-established statutory and case law, and otherwise the normal course of judicial review. That decision cannot stand.

C. MOUs.[6]

As further evidence of the "interference" contemplated in FOIA exemption (7)(A), consider the more than forty (40) Memoranda of Understanding currently in effect between ATF and law enforcement agencies nationwide. These Memoranda ("MOUs") reflect the mutual interests of ATF and state or local agencies requesting ATF trace data to maintain the confidentiality of the data maintained and exchanged between ATF and these requesting law enforcement agencies. Not only do the Memoranda themselves stand for the proposition that disclosure of such information would interfere with ongoing criminal investigations and possibly jeopardize the lives of their own law enforcement personnel, but they expressly state so:

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[6]*See also* correspondence of Raymond W. Kelly, City of New York Police Commissioner (attached hereto as Appendix C), and Affidavit of Pedro J. Perez, New York State Police, Assistant Deputy Superintendent (attached hereto as Appendix D), submitted in support of ATF's decision to withhold the same type of trace arms data at issue in this case, pursuant to a subpoena issued by the United States District Court for the Eastern District of New York in a similar case.

> *The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings.* This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. *It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.*

See City of Chicago Memorandum of Understanding, p. 2 (emphasis added), attached hereto as Appendix B.

Of particular interest is the MOU between ATF and the City of Chicago Police Department. Why else would the City of Chicago Police Department enter into a written agreement evincing mutual interests and benefits of confidentiality regarding the release of trace arms data, if not to preserve the efforts of investigations? Logically, and by tacit admission, it is because release of the trace arms data would compromise effectiveness of criminal investigations in the usual, normal context which this information is used. Stated another way, the City of Chicago expects the MOU confidentiality for its normal course of business, but rebuffs it in this lawsuit.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the

ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties. The MOUs, and particularly that in effect with the City of Chicago Police Department, very clearly evince these issues.

D. Legislative History.

In addition to the MOU and law enforcement affidavits, the United States Senate, in a 1983 Senate report, "recognize[d] the lack of certainty in attempting to predict harm," which recognition ultimately resulted in the use of an objective standard of reasonableness for application of FOIA Exemption (7)(A). S. Rep. No. 221, 98th Cong., 1st Sess. (1983). *See also Reporters Committee,* supra, 489 U.S. at 778, n. 22. Thus, while disregarding competent and credible law enforcement expertise of expected interference, the Seventh Circuit Court also failed to recognize the appropriate legal standard for application of FOIA Exemption (7)(A), **which standard was expressly contemplated and adopted by congress**.

The decision of the Seventh Circuit Court of Appeals defies the case law, the expressed statutory language, the legislative history, and the normal course and scope of judicial review. This is as much a matter of common sense as it is the reasoned judgment and expertise provided by ATF. The decision of the Seventh Circuit Court of Appeals seems to omit the context in which these laws/exemptions are applied, and simply mistaken the appropriate balance that must be made when considering the release of the information and the effects therefrom. This Court should properly reverse that decision and uphold these useful and purposeful standards.

III. A CHILLING EFFECT

In the law, we often speak in terms of the effect a particular action or decision might have on a particular issue or effort. In this case, the decision of the Seventh Circuit Court of Appeals may have a "chilling effect" on the use and/or usefulness of the ATF's tracing of firearms and maintenance of records such as trace data. Why would state or local law enforcement agencies submit information, or request information, only to have it shared with the criminal suspects? Why would law enforcement personnel submit witness information, or their own officers' names, when such information could end up in the wrong hands, placing those witnesses' or officers' lives in danger? At best, the witnesses would be subject to intimidation and the evidence tampered with or eliminated entirely. At worst, the witnesses or officers become targets themselves. Even without regard to the Freedom of Information Act, this is not a risk reasonable people would be willing to take. Why then, with the presence of an FOIA exemption that permits this information to be maintained confidentially, would we disregard those risks? The FOP respectfully submits these interests, and legal precedent, form a sufficient legal basis upon which to overturn the Seventh Circuit Court of Appeals decision requiring mandatory disclosure of this sensitive information.

CONCLUSION

This Brief In Support is intended to provide the Court with the practical context and consequences of the Seventh Circuit Court of Appeals' decision and ordered disclosure of ATF arms trace data, the results of which will have significant effects on the work and efforts of law enforcement personnel. Ultimately, if law enforcement efforts are hindered, tampered with, eluded or precluded altogether, criminal wrongdoing may go undetected and/or unpunished. Even worse, release of this data may result in the lives of witnesses or law enforcement being threatened. Those consequences could be disastrous. This Court necessarily presents the proper forum for consideration of the important interests and issues presented, and ultimately why the FOP respectfully requests this Court exercise its supervisory powers over the Seventh Circuit Court of Appeals and review the decision *sub judice*.

Respectfully submitted,

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APPENDIX A – BRIEF OF AMICUS CURIAE THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*, DATED JUNE 7, 2002

No. 01-2167

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: No.02-2167

Short Caption: City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Fraternal Order of Police

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Crabbe, Brown & James, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more the party's or amicus' stock:

None

Attorney's Signature:_____
Date:_____

Attorney's Printed Name: **Larry H. James**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No.__

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Freedom of Information Act., 5 U.S.C. 5 U.S.C. § 552(b)(7)(A).....2, 3, 4, 9,10, 11

Pub. L. No. 99-570, §1802, 100 Stat. 3207-48. 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2167

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE*
THE FRATERNAL ORDER OF POLICE
IN SUPPORT OF REHEARING *EN BANC*

STATEMENT OF APPROPRIATENESS FOR REHEARING *EN BANC*

The issues raised in the Petition for Rehear ing En Banc, are of exceptional importance to the 298,852 members of *Amicus Curiae,* The Fraternal Order of Police. The Fraternal Order of Police represents law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. The subject of this appeal is the court-ordered disclosure under the Freedom of

Information Act of investigative firearm information from the ATF. Disclosure of this information will greatly interfere with thousands of ongoing criminal investigations, and jeopardize the lives and safety of law enforcement personnel represented by The Fraternal Order of Police. In addition, the ruling from the three (3) judge Panel of this Court, which Appellant now seeks to be reheard en banc, clearly conflicts with the United States Supreme Court case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978) and its progeny.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether certain records maintained by the Bureau of Alcohol, Tobacco, and Firearms (ATF) regarding the tracing of firearms involved in crimes and the multiple sales of handguns are protected from disclosure under Exemption 7(A) of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(7)(A), which exempts from disclosure of "records or information compiled for law enforcement purposes," to the extent that the production of such records "could responsibly be expected to interfere with enforcement proceedings."

STATEMENT OF THE CASE

1. Nature of the Case and Disposition Below.

The City of Chicago brought this action under the Freedom of Information Act, seeking certain records maintained by the ATF regarding the tracing of firearms involved in crimes and multiple sales of handguns. The ATF provided to the City all of the requested data concerning Chicago guns, and the vast majority of nationwide data, but withheld certain nationwide data for a period of one to five years under

Exemption 7(A), because release of the data could reasonably be expected to interfere with law enforcement proceedings or ongoing investigations. In addition, the ATF withheld individual names and addresses indefinitely, under Exemptions 6 and 7(C), to protect personal privacy.

Both parties moved for summary judgment, and on March 6, 2001, the District Court granted the City's Motion and denied the ATF's Motion. The court held that the withheld information was not protected from disclosure under the asserted exemptions.

On March 13, 2001, the City moved to amend the judgment. On March 21, 2001, the court granted the City's Motion, in part, and denied it in part. On the same date, the court granted the government's Motion for a stay pending appeal. On May 4, 2001, the Appellant ATF filed a timely Notice of Appeal. On April 25, 2002, a three (3) judge Panel of this Court issued its decision upholding the findings of the District Court. ***City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms***, 287 F.3d 628 (7th Cir. 2002). The ATF and this *Amicus Curiae,* The Fraternal Order of Police, now move this Court for a rehearing en banc on the issues presented.

2. **Factual Background.**

The Appellant ATF provides firearms tracing services in support of criminal investigations to federal, state, local and international law enforcement agencies. Officials at ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided pursuant to a trace request, into the trace database sub-module of the Firearms Tracing System (FTS), which collects tracking data on traces of firearms

suspected of being involved in a crime. See Appellant's Appendix (Apt. App. at 58-59 ¶ 11). Requests from over 17,000 law enforcement agencies in the United States and abroad (other than the ATF), comprise the bulk of firearms traces conducted by the ATF. A requesting law enforcement agency must have an open investigation to even request that a trace be conducted by the ATF. (Apt. App at pp. 3-4, ¶ 11).

SUMMARY OF ARGUMENT

The safety and mission of law enforcement, and of the men and women who carry out law enforcement, is exactly at the center of the issues presented in this case. There can be little doubt that the Court's decision that these records are not protected by Exemption 7(A) of the Freedom of Information Act will result in jeopardized safety to law enforcement personnel involved in ongoing investigations. As established by the Declaration of then Assistant Director for Field Operations, and now Deputy Director of ATF, David L. Benton, information in the Firearms Tracing System is compiled by information received from local, state and international law enforcement agencies seeking and providing information regarding ongoing criminal investigations. (Apt. App. at pp 3-4, ¶ 11). This compiled information includes witness names, law enforcement names and departments, gun dealers, other suspects and other suspected crimes. And again, no request would have been made by the law enforcement agency unless an active investigation were ongoing. Thus, requiring the ATF to release information (witness and law enforcement names) that is necessarily related to an ongoing law enforcement investigation, can reasonably be expected to interfere with these investigations and put law enforcement officers in harm's way.

Further, the Court applied an incorrect standard for determining application of Exemption 7(A), as set forth in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). In the ***NLRB v. Robbins Tire & Rubber Co.*** case, the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that the release of specific information withheld would interfere with a specific enforcement proceeding. Instead, an agency need show only " . . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference." 437 U.S. at 236. **There are at least 298,852 reasons why this standard should be applied as intended by the United States Supreme Court.**

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;
- Instantly, he or she has the following information:
  - Suspected crimes;
  - Suspected crime location;

  - Suspected crime weapons;
  - Suspects and their associates;
  - Law enforcement officer names and departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witnesses.
- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fraternal Order of Police member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

gations, many of which involve or could reasonably be expected to involve firearms.

The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by the ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

The Fraternal Order of Police and its 298,852 members take very seriously the firearms reduction strategy that is being pursued, by using the ATF database. However, if law enforcement agencies cannot trust that the gun tracing information provided to the ATF will be held in confidence for at least a certain period of time to allow for the completion of the criminal investigation, there is no question that the law enforcement agencies will be reluctant to provide this valuable gun tracing information to the ATF database. Thus, a

blanket disclosure policy with respect to the sensitive law enforcement information in these databases will result in the refusal of many agencies to conduct comprehensive tracing of crime guns. This will adversely impact the utility of the ATF's entire crime gun tracing program. Since the ATF's crime gun tracing program is part of a larger law enforcement and gun proliferation reduction strategy shared by many levels of law enforcement agencies nationwide, the Panel's decision regarding the release of this information will have a chilling effect on all law enforcement initiatives, not only the ATF database at issue in this case.

The three (3) judge Panel in its Opinion failed to appropriately apply the standard, and held that the exemption does not shield any of the requested data from disclosure because the ATF ". . . made simply no showing that enforcement proceedings are 'pending or reasonably anticipated' beyond mere hypothetical scenarios." 287 F.3d at *12. To the contrary, ATF provided specific examples of the types of harm that would result from the premature disclosure of trace data. This holding misapplies and misconstrues the United States Supreme Court standard set forth in ***Robbins Tire***. In that regard, this holding serves to endanger law enforcement personnel engaged in open and pending criminal investigations, by giving them enough information to further conceal crime, elude capture and identify potential witnesses and law enforcement officials. The Fraternal Order of Police is here to say that there are thousands of ongoing criminal investiga-

tions that could reasonably be expected to be compromised by the Panel's decision.[1]

Confidentiality is the cornerstone of effective law enforcement investigation. It is the one tool that cannot be compromised nor negotiated away. To do so exposes law enforcement officials and the public to a better-informed and more effective criminal element. In short, this decision, if left to stand, provides the criminal with direct access to information that would greatly assist the criminal in carrying out criminal activity, as well as an aide in avoiding detection from the law and endangering the public. Most importantly, this decision goes beyond any constitutional safeguards imaginable and places law enforcement on a slippery slope that will be difficult, if not impossible, to reverse.

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[1]Since the issuance of the District Court's ruling on this issue in 2001, many of the cities that provide tracing data to ATF pursuant to the Youth Crime Gun interdiction initiative, a comprehensive firearms tracing initiative, have signed memoranda of understanding ("MOU") with ATF. They specifically request that the information submitted to ATF be accorded confidentiality, and specifically set forth the harms that would be caused to open investigations by disclosure, and request that their trace information not be released by ATF without their prior consent. The Fraternal Order of Police fully supports this concept, and understands that the four (4) jurisdictions that purported to support Chicago's position in the District have signed these MOU. However, because of the Panel's decision, ATF is effectively precluded from asserting applicable FOIA exemptions with respect to this data.

ARGUMENT

I. Because of the Exceptional Importance of this Issue to Law Enforcement Personnel (i.e., the Significant Risk of Harm to Law Enforcement Personnel), as Well as the Fact That the Panel's Decision Is in Conflict With the Standard Set in the Case of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Matter Is Appropriate for Rehearing En Banc.

The release by the ATF of firearms tracing data supplied by law enforcement agencies during the pendency of ongoing criminal investigations is of exceptional importance, both to the integrity of criminal investigations around the United States and the safety of law enforcement officers involved in those investigations. The Fraternal Order of Police represents 298,852 law enforcement personnel from various agencies all over the United States. The impact of the Panel's ruling dramatically effects the day-to-day lives of law enforcement personnel employed on the streets of this country. The contemporaneous public release of information tied directly to ongoing criminal investigations will hinder the law enforcement agency's ability to control its investigation, enable suspects to elude detection and intimidate witnesses, prematurely reveal evidence or strategy, and potentially put the lives of law enforcement personnel in danger. *See e.g.* ***Solar Sources, Inc. v. United States***, 142 F.3d 1033, 1039 (7th Cir. 1998).

The Panel in this case held that the firearms tracing information must be disclosed by the ATF because the ATF " . . . failed to identify any particular ongoing investigations , . . ." and ". . . failed to testify as to any specific instances in which disclosing the type of records requested did result in

disclosing the type of records requested did result in interference with any proceeding or investigation." 287 F.3d at *11-12. It is axiomatic that because the criminal investigation is the reason this data is collected from law enforcement agencies, release of that information can reasonably be expected to relate to ongoing or prospective law enforcement proceedings and investigations. As is stated in the Declaration of Assistant Director of Field Operations for the ATF, David L. Benton, the requesting law enforcement agency provides the ATF with the manufacturer, weapon type, caliber, and serial number of a firearm recovered in connection with a crime and investigation of the same. (Apt. App. at p. 5, ¶ 15). The ATF then conducts a trace regarding the firearm information. That trace data is then used to link suspects to firearm-related criminal investigations, identify any potential fire-arms traffickers, and to detect the patterns and sources of firearms that are used in crimes. (Apt. App. at p. 5, ¶ 17). Because of the sheer volume of trace requests that are received by the ATF, it is impossible to monitor the status of each pending criminal investigation. (Apt. App. at p. 5, ¶¶19, 20). Such monitoring would be extremely burdensome on ATF and Fraternal Order of Police member agencies, particularly if there is no enforcement reason for either ATF or Fraternal Order of Police to do so, unless working on a case with ATF. Therefore, to require the ATF to provide specific "concrete examples" of ongoing investigations that may be jeopardized is not only illogical, but virtually impossible and not required under Exemption 7(A) Supreme Court precedent. Simply put, the trace data would not even be in the ATF database if there were not already an ongoing criminal investigation. It is axiomatic that to provide the trace data to any person who requests this information would jeopardize

the effectiveness of law enforcement officers of ongoing criminal investigations, as well as potentially jeopardize the safety of law enforcement personnel working undercover or in other capacities in the criminal investigations.

Also worthy of mention is the fact that the ATF only seeks to withhold this law enforcement-sensitive data under Exemption 7(A) for a limited period of time. Certain information reasonably expected to interfere with enforcement proceedings would be held from FOIA disclosure for a period of one (1) year, not indefinitely. Surely, this balancing of public interest in disclosure, versus the release of sensitive crime gun data, satisfies the balancing analysis first set forth by the Supreme Court in ***Robbins Tire***, wherein the Court stated:

> A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the . . . delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.

437 U.S. at 236.

The same is true in the present case. Contemporaneous release of trace data to law enforcement and the general public would allow media, and anyone else, to "get out ahead" of an investigation. This would complicate an investigation in any number of ways, such as by "tipping off" suspects or tainting and/or endangering witnesses and law enforcement officers. It appears that the Panel in its analysis overlooked

or disregarded this important balancing analysis. This certainly is an issue to be examined on rehearing en banc. The Fraternal Order of Police fully supports ATF's position to release the trace data after the one (1) year period following the trace.

Further, included among the federal agencies that submit gun trace requests are agencies that submit requests regarding the movement of arms overseas. (Apt. App. at pp. 6-7, ¶ 21). It scarcely needs repeating that as a result of recent world events and terrorist attacks on United States' soil, the confidentiality of tracing data for the movement of firearms overseas is of the utmost importance. It does not appear that the Panel in this case considered the far-reaching and potentially deadly implications of the decision that the firearm tracing data is not exempt from disclosure pursuant to Exemption 7(A). As has been disclosed in recent news reports, the monitoring of potential terrorist activity, including the tracking of weapons movement overseas, can potentially be used to prevent future terrorist attacks on American soil. The Panel's mandate that the ATF be required to provide "concrete examples of ongoing investigations that could be jeopardized" ignores the monumental potential for harm, should this crime gun tracing information be released to any person who simply files a FOIA request.

In addition to the danger the Panel's decision poses to law enforcement personnel as stated above, the Panel misconstrued clear United States Supreme Court precedent set out in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). The Panel suggested in its Opinion that Exemption 7(A) did not apply to this case for two (2) reasons. The first was that the "ATF could not identify a single

concrete law enforcement proceeding that could be endangered by the release of this information." 287 F.3d at 12. The second was that the ATF's witnesses "failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." ***Id.*** The Panel's holding in this regard is contrary to the "generic" approach adopted by the United States Supreme Court in this area.

In ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978), the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that release of the specific information withheld would interfere with any specific enforcement proceeding. Instead, an agency need only show ". . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference. . . ." 437 U.S. at 236. This approval of an agency's use of a generic approach has been further bolstered by Congress' Amendment of Exemption 7(A) in 1986, which lessened the showing of harm required for a demonstration that release of the information "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings. *See* ***Pub. L. No. 99-570, §1802, 100 Stat. 3207-48.*** Moreover, the Seventh Circuit has upheld the generic approach to the existence of prospective enforcement proceedings, without requiring the agency

to establish the existence of specific, open investigations. *See e.g.* ***Marzen v. H.H.S.***, 632 F. Supp. 785, 806 (N.D. Ill. 1985) *aff'd* 825 F.2d 1148 (7th Cir. 1987)(holding that medical records that H.H.S. obtained from hospitals fell within the protection of Exemption 7(A) where the release of such records would harm the government's ability to obtain such records in the future, thus interfering with its ability to enforce federal law). Therefore, the standard applied by the Panel in determining that Exemption 7(A) did not apply in this case clearly conflicts with prior Supreme Court and Seventh Circuit precedent.

Further, because of the sheer volume of trace requests received from law enforcement agencies every year, it is simply impossible to provide "concrete" examples of ongoing investigations that could be jeopardized. (Apt. App. at pp. 6, ¶ 19). The Panel missed the obvious point that at the time the trace requests are submitted from law enforcement agencies, they are the subject of thousands of ongoing criminal investigations. Thus, there is no question that much of the requested data that has been ordered to be disclosed is related to witnesses, suspects and undercover operatives in ongoing law enforcement proceedings and criminal investigations. The requirement that the ATF more specifically document its reasons for withholding the required national database information is not only impossible, but also unnecessary. It is axiomatic that at least a portion of the requested data, since it was provided during the course of an ongoing law enforcement investigation, would still relate to an ongoing law enforcement investigation. Requiring this data to be released on the erroneous grounds that disclosure could not reasonably be expected to interfere with enforcement proceedings, turns a blind eye to not only the reality of law enforcement investigations, but also to the safety of individual officers who may be involved in dangerous investigations or even be acting in an undercover capacity that could be jeopardized.

CONCLUSION

Because the three (3) judge Panel's decision in this case is of exceptional importance to the law enforcement community, and because that decision is in clear conflict with Supreme Court and Seventh Circuit precedent, *Amicus Curiae,* The Fraternal Order of Police, respectfully requests this Honorable Court to reconsider this matter en banc.

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CERTIFICATE OF COMPLIANCE

Now comes Counsel for *Amicus Curiae,* The Fraternal Order of Police, pursuant to Rule 32(a)(7) and certifies that the Brief complies with the type-volume limitation. Counsel certifies that *Amicus Curiae* The Fraternal Order of Police's Brief contains 4,580 words.

LARRY H. JAMES (0021773)
CHRISTINA L. CORL (0067869)
LAURA M. COMEK (0070959)

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2002, I transmitted the original and 30 copies of the foregoing *Amicus Curiae* Brief of the Fraternal Order of Police in Support of Petition for Rehearing En Banc, along with a digital version in PDF format, to the Court's web cite and to each party as listed below via regular U.S. Mail and PDF file, or floppy disk:

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APPENDIX B – CITY OF CHICAGO MEMORANDUM OF UNDERSTANDING, DATED SEPTEMBER 18, 2001

THE YOUTH CRIME GUN INTERDICTION INITIATIVE (YCGII) MEMORANDUM OF UNDERSTANDING

The parties signing this memorandum of understanding hereto agree that it is to their mutual benefit to cooperate in eliminating the illegal flow of firearms to youth through enforcement efforts involving the investigation and prosecution of illegal firearms traffickers and through study focusing on the illegal youth firearms market to determine the trends, patterns, and scope of that market and develop effective strategies to address the market.

BACKGROUND

The YCGII was developed by the Department of the Treasury (Enforcement) and the Bureau of Alcohol, Tobacco and Firearms (ATF) in partnership with the Department of Justices' Office of Community Oriented Policing Services (COPS) and the National Institute of Justice (NIJ). Need for the YCGII sterns from the fact that firearms related to youth homicides have nearly tripled since 1985. Through intervention in the illicit firearms markets, we will try to reduce or stop the upward spiral of youth on youth firearms related homicides.

To accomplish this, the YCGII will not be strictly limited to focusing on illegal traffickers of firearms to the Federally defined "juvenile." Rather, participating (ATF) field offices and police departments will focus on illegal firearms traf-

fickers to youth, understood as including the Federally defined under 18 years of age, with flexibility to focus on illegal firearms traffickers who supply young people up to 24 years or older if circumstances warrant.

PURPOSE:

This memorandum will formalize relationships between the participating agencies with regard to policy and procedures, utilization of resources, and planning/training in order to maximize interagency cooperation and coordination.

OBJECTIVES:

The nationwide YCGII program has four basic interrelated objectives which will apply in each site:

1. working with U.S. Attorneys and State/local procedures to intensify ATF and local police efforts to investigate and incarcerate individuals who illegally traffic in firearms to young people and ensure those arrested are prosecuted in the appropriate venue, which shall be determined on a case by case basis.
2. to ensure local police departments trace all crime guns recovered, and in particular, those firearms taken from youth.
3. to combine the efforts of ATF special agents, local police and NIJ researchers to develop new methods of mapping illegal firearms trafficking patterns and practices, especially as this relates to the illegal trafficking of firearms to youth.

4. to provide more ATF support for State and local enforcement efforts aimed at intervening in the illegal local youth firearms market.

CONDITIONS AND PROCDURES:

- ATF agrees to furnish an ATF owned laptop computer to the Chicago Police Department. The Chicago Police Department agrees and acknowledges that this equipment shall remain the property of ATF and the U.S. Government, unless otherwise specified.
- The Chicago Police Department agrees to assume the cost of replacement or repair of ATF owned equipment, in the event of unauthorized movement, alteration, damage or destruction caused by its employees, contractors, or any other person under its control.
- ATF retains the right to remove ATF owned equipment upon (1) receipt of written notification of the termination of participation in the YCGII by the Chicago Police Department; (2) termination of the YCGII program by ATF, or (3) the cancellation of this MOU by ATF. If the ATF owned equipment will be removed from the Chicago Police Department, written notice of the removal will be provided by ATF not less than 10 business days to the actual removal of the equipment.
- ATF and the Chicago Police Department acknowledge their understanding that the operations described in this MOU are subject to audit by ATF; the U.S. Department of the Treasury, Office of Inspector General; the General Accounting Office; and other

auditors designated by the U.S. Government. Such audit may include reviews of any and all records, documents, reports, accounts, invoices, receipts, or other evidence.

- The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings. This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.

CONCLUSION

It is the intent of the signatories that this agreement ensures coordination, cooperation and the mutual conduct of enforcement and research activities. The result of this mutual cooperation and coordination will be the successful prosecution of illegal firearms in State and Federal jurisdictions as well as the development of an accurate picture of the illegal youth firearms market and the development of new strategies to effectively interrupt this market and impact on the rate of juvenile related firearms violence. The research findings will be published at the conclusion of this initiative for the benefit of all law enforcement.

Parties to this agreement may terminate their participation at any time upon written notification of their intent to withdraw to all other parties in the agreement. At such time that other Federal government resources may become available, a new Memorandum of Understanding will be initiated.

In witness whereof, the parties have hereunto executed this Memorandum of Understanding.

_____	_____
Name	Name
_____	_____
Title	Title
_____	_____
Department	Department

APPENDIX C – CORRESPONDENCE OF RAYMOND W. KELLY, CITY OF NEW YORK POLICE COMMISSIONER, DATED AUGUST 19, 2002

THE POLICE COMMISSIONER
CITY OF NEW YORK

August 19, 2002

Honorable John Ashcroft
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Ashcroft:

I am writing to express my concern about the possibility that firearms trace information compiled by the Bureau of Alcohol, Tobacco, and Firearms (ATF) tracing system might be released in ways that will compromise critical law enforcement investigation and endanger the lives of Police Officers and members of the public.

It is my understanding that the recent decision by the Seventh Circuit Court of Appeals (in the Case of *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*) and the court's denial of a request for *en banc* rehearing, if allowed to stand, will permit contemporaneous, unredacted disclosure of firearms trace information to anyone who asks for it, including the very criminals who are under investigation. Such a result clearly would be catastrophic for law enforcement, would compro-

mise national security, and would signal the end of the trace program, as law enforcement agencies would no longer be able to rely on the current ability to share critical information confidentially.

Law enforcement agencies at every level rely on the ATF's tracing system and resources to advance critically important investigations. The use of these traces has resulted in the successful closure of many criminal investigations, the conviction of numerous firearms offenders, the recovery of thousands of illegal firearms form unlicensed possessors, and the dismantling of many insidious and violent criminal organizations. The ability to trace firearms, therefore, has become an essential tool in conducting a wide array of critical and sensitive law enforcement investigations. The use of this resource by local and state agencies also is adramatic illustration of the need for and benefits of a continuing, close, and confidential cooperative relationship with federal agencies to prevent and solve crimes.

The prospect that information obtained through these traces may be available for release by request to ATF under the Freedom of Information Act (FOIA) is therefore quite disturbing. Even more alarming is the possibility that this information might be released while the investigation remains open. The release of trace information under FOIA seriously jeopardizes not only the investigations, but also the lives of law enforcement officers, informants, witnesses, and others. Even when the information does not identify specific individuals who may be endangered, merely disclosing that a trace was conducted may be enough to create a grave threat to life, to result in the flight of the suspects or the destructions of evidence, or to otherwise compromise investigations

in which law enforcement agencies have invested so much. The possibility that information concerning investigations may be released and used in these ways may, in fact, result in some agencies discontinuing –or at least curtailing – their use of the trace system. Thus, the effectiveness of the overall trace system, as well as the essential relationship of cooperation that has been cultivated between federal and local law enforcement, also would be seriously undermined.

Accordingly, in order to ensure that this information is not released inappropriately, and that the ability to conduct such traces remains a useful tool for all law enforcement agencies, I wholeheartedly support ATF's efforts to protect and preserve the confidentiality of firearms trace records and information, and I encourage you to pursue an appeal of this case by seeking a writ of certiorari from the United States Supreme Court. Please do not hesitate to contact me if I may be of further assistance in this effort.

Sincerely,

Raymond W. Kelly
Police Commissioner

APPENDIX D- AFFIDAVIT OF PEDRO J. PEREZ, NEW YORK STATE POLICE, ASSISTANT DEPUTY SUPERINTENDENT, DATED JULY 10, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-3999

- against -

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-7037

- against -

(Weinstein, J.)
(Pollack, M.J)

ACUSPORT, CORP., et al.
Defendants.

Pedro J. Perez, as his declaration, pursuant to 28 U.S.C. § 1746, states:

1. I am the Assistant Deputy Superintendent for the New York State Police. In this position, my responsibilities include supervision of the Bureau of Criminal Investi-

gation. I have been with the New York State Police for 20 years. I have had extensive experience in criminal investigations involving firearms throughout my career. I have also supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the New York State Police, in these investigations, is the tracing of firearms by the Bureau of Alcohol, Tobacco, and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. The Bureau of Alcohol, Tobacco, and Firearms (ATF) provides firearms tracing services in support of criminal investigations to our Department. Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently provides the general public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If ATF were to fully disclose the firearms tracing information sought by subpoena in this case, criminals,

who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosures are too grave to rely on safeguards currently in place, such as "do not contact" codes. To protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harm at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could easily see what guns were recently traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an

undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation of ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to reduce firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to link a suspect to a firearm-related

criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their *modus operandi* if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace request that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation with another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a

criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 10th day of July 2002.

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September 26, 2002

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Re: Bureau of Alcohol, Tobacco and Firearms v. City of Chicago
U.S. Supreme Court Case No. 02-322
Our File No. 10093-29014

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation with David Graver regarding the above-reference United States Supreme Court case. Pursuant to our discussion, the City of Chicago has given its consent to the National Fraternal Order of Police to submit and amicus brief in support of the Petition for Writ of Certiorari filed by ATF in this matter. As we discussed, this consent is necessary pursuant to Supreme Court Rule 37.

If you have any questions or if I can be of assistance, please do not hesitate to contact me. Otherwise, this correspondence will serve to confirm our discussion and your agreement to the same. Thank you again for your assistance.

Very truly yours,

Laura MacGregor Comek

LMC:rm

cc: Larry H. James
General Counsel, National Fraternal Order of Police